

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of The Application of)	
)	
Daugherty Broadcasting Company, L.L.C.,)	
Assignor)	File No. BAL-20010816AAG
)	
and)	
)	
Clear Channel Broadcasting Licenses, Inc.,)	
Assignee)	
)	
For Consent to Assignment of License of)	
WBRJ(AM), Marietta, OH)	

MEMORANDUM OPINION AND ORDER

Adopted: September 4, 2002

Released: September 25, 2002

By the Commission: Commissioner Copps dissenting and issuing a statement.

1. In this order, we consider the above-captioned application of Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") to acquire the license of station WBRJ(AM), Marietta, Ohio from Daugherty Broadcasting Company, L.L.C. ("Daugherty"). Because this application was pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317 ("*Local Radio Ownership NPRM*"), we resolve the competition concerns raised by this application pursuant to the interim policy adopted in that notice.¹ This application is uncontested. After reviewing the record, we conclude that grant of this application is consistent with the public interest.

I. INTRODUCTION

2. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market.² In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rule in accordance with Congress' directive in Section 202(b) of the Telecommunications Act of 1996.³ Since then, the Commission has granted thousands of assignment and transfer of control applications proposing transactions that complied with the new limits. In certain instances, however, the Commission

¹ See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001).

² See generally *id.* at 19862-70 ¶¶ 3-18.

³ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(b); 47 C.F.R. § 73.3555(a)(1).

has received applications proposing transactions that would comply with the new limits, but that nevertheless would produce concentration levels that raised significant concerns about the potential impact on the public interest.

3. In response to these concerns, the Commission concluded that it has “an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest.”⁴ In August 1998, the Commission also began “flagging” public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission’s public interest concerns.⁵ Under this policy, the Commission flags proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market.⁶ The public notice for a flagged transaction indicates that the Commission intends to subject the proposed transaction to further competition review and seeks comments from the public on that issue.⁷

4. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed concern that “our current policies on local radio ownership [did] not adequately reflect current industry conditions” and had “led to unfortunate delays” in the processing of assignment and transfer applications.⁸ Accordingly, we adopted the *Local Radio Ownership NPRM* “to undertake a comprehensive examination of our rules and policies concerning local radio ownership” and to “develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition.”⁹ In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our

⁴ *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KIXK, Inc.*, 13 FCC Rcd 15685 (1998)). See also *Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

⁵ See Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

⁶ See *AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

⁷ See generally *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 18. A flagged public notice includes the following language:

Note: Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is undertaken pursuant to the Commission’s obligation under Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), to grant an application to transfer or assign a broadcast license or permit only if so doing serves the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.

⁸ *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

⁹ *Id.*

traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to “guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding.”¹⁰ Although we recognized the need to “handle currently pending radio assignment and transfer applications and to address any future applications filed” while the *NPRM* is pending, we disavowed any intent to prejudge the “ultimate decision” in the rulemaking and rejected any “fundamental” changes to our current policy pending completion of the rulemaking.¹¹

6. Under our interim policy, “we presume that an application that falls below the [50/70] screen will not raise competition concerns” unless a petition to deny raising competition issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission’s staff to “conduct a public interest analysis,” including “an independent preliminary competitive analysis,” and sets forth generic areas of inquiry for this purpose.¹² The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competition concerns.

7. We decide the application before us pursuant to our interim policy, which entails a competition analysis of the proposed transaction. This proposed transaction raises competition concerns because it provides additional station capacity to Clear Channel, the dominant radio group in the Parkersburg, West Virginia – Marietta, Ohio Arbitron metropolitan area (“Parkersburg metro”).¹³ Currently, Clear Channel accounts for 55.7 percent radio advertising market share and the top two station groups (Clear Channel and Burbach WV, L.L.C. (“Burbach”)) garner 82.7 percent of the local radio advertising revenues in the Parkersburg metro.¹⁴ The current market structure makes it difficult for a third viable competitor to emerge. These concentration levels, however, do not provide a complete picture of the competitive realities within the Parkersburg metro. The record indicates that the Daugherty station is in poor financial condition and that, if the proposed transaction is not approved, the station is likely to go off the air. The record also indicates that Clear Channel’s acquisition of the Daugherty station will ensure that this station stays on the air and continues to provide service to listeners in the market. For these reasons, we conclude that Clear Channel’s acquisition of the Daugherty station serves the public interest.

II. BACKGROUND

8. Clear Channel is the licensee of five stations in the Parkersburg metro: (1) WDMX(FM), Vienna, WV; (2) WLTP(AM), Parkersburg, WV; (3) WNUS(FM), Belpre, OH; (4) WRVB(FM), Marietta, OH; and (5) WRZZ(FM), Elizabeth, WV. Through its proposed acquisition of WBRJ(AM), Clear Channel would own two AM stations and four FM stations in the metro.

¹⁰ *Id.* at 19894 ¶ 84.

¹¹ *Id.*

¹² *Id.* at 19895 ¶ 86.

¹³ A metro is a metropolitan area defined by the Arbitron rating service, which is used by radio stations and radio advertisers in negotiating and determining advertising rates.

¹⁴ These figures do not include revenues garnered by Clear Channel through its joint sales agreement (“JSA”) with Bennco, Inc. for station WVVV(FM), Williamstown, WV. *See infra* ¶ 25.

9. On August 22, 2001, the Commission issued a public notice indicating that the Clear Channel application had been accepted for filing.¹⁵ The public notice also “flagged” the application pursuant to the Commission’s “50/70” screen. Based on Year 2001 revenue estimates from the BIA¹⁶ database, the six stations Clear Channel proposes to own account for 55.7 percent revenue share in the Parkersburg metro.¹⁷ Post-consummation, Clear Channel and Burbach would collectively control 82.7 percent of the advertising revenue share in the metro.¹⁸

10. No party filed a petition to deny the transaction in response to the flagged public notice. Daugherty filed a “petition for grant of application” dated December 5, 2001,¹⁹ in which it commented on the potential competitive impact of the proposed transaction and claimed that the Commission incorrectly flagged its application based on erroneous BIA revenue figures.²⁰

11. By letter dated April 2, 2002 (“Inquiry Letter”), the staff requested that the parties provide additional information in order to assess fully the transaction’s effect on the public interest. The Inquiry Letter also allowed the parties to update the record to reflect competitive changes that may have occurred in the Parkersburg metro market and in light of the interim policy we adopted in the *Local Radio Ownership NPRM*.²¹ Clear Channel filed a response on April 22, 2002.²² Daugherty filed a response on April 11, 2002, and submitted supplemental material on July 19, 2002.²³

¹⁵ See Public Notice, Broadcast Applications, Report No. 25054 (rel. Aug. 22, 2001).

¹⁶ BIA is a communications and information technology investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries. Unless otherwise specified, references throughout this document to BIA data refer to the year 2001 data made available to the public on June 4, 2002.

¹⁷ See *supra* note 14.

¹⁸ *Id.*

¹⁹ See Petition for Grant of Application of Daugherty Broadcasting Company, L.L.C. (dated Dec. 5, 2001) (“Daugherty Dec. 5, 2001 Response”).

²⁰ Daugherty claims the error involved the year 2000 revenue estimates reported in the BIA database. See Daugherty Dec. 5, 2001 Response at 4; see also Letter from Lauren A. Colby, Counsel for Daugherty Broadcasting Company, L.L.C., to Roy Stewart, Chief, Mass Media Bureau (dated Dec. 26, 2001) (asserting that its application was flagged in error because of incorrect year 2000 BIA data). On January 14, 2002, Daugherty submitted a letter enclosing a January 11, 2002 e-mail from Donna Grigsby, Director of Research, BIA Financial Network, that stated that the year 2000 BIA revenue estimates for WBRJ(AM) had been corrected to reflect that the station had been on the air for only 8 days (18 days, according to the parties’ submissions) in 2000. See Letter from Lauren A. Colby, Counsel for Daugherty Broadcasting Company, L.L.C., to Roy Stewart, Chief, Mass Media Bureau (dated Jan. 14, 2002). Our analysis of this application is based, however, on year 2001 revenue estimates from the BIA database.

²¹ Letter from Peter H. Doyle, Chief, Audio Division, Office of Broadcast License Policy, Media Bureau, to Lauren A. Colby, Esq., *et al.* (dated Apr. 2, 2002).

²² Letter from Christopher L. Robbins, Counsel for Clear Channel Broadcasting Licenses, Inc., to Peter H. Doyle, Chief, Audio Division, Office of Broadcast License Policy, Media Bureau (dated Apr. 22, 2002) (“Clear Channel Response”).

²³ Letter from Lauren A. Colby, Counsel for Daugherty Broadcasting Company, L.L.C., to Peter H. Doyle, Chief, Audio Division, Office of Broadcast License Policy, Media Bureau (dated Apr. 11, 2002) (“Daugherty Response”); Letter from Lauren A. Colby, Counsel for Daugherty Broadcasting Company, L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Jul. 19, 2002) (“Daugherty Supp. Response”).

III. DISCUSSION

A. Framework for Analysis Under Interim Policy

12. Section 310(d) of the Communications Act of 1934, as amended (the “Communications Act”), requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of Daugherty’s radio broadcast license to Clear Channel before the assignment may occur.²⁴ We are making that finding in this case pursuant to the interim policy laid out in the *Local Radio Ownership NPRM*.²⁵ Under the interim policy, we conduct a public interest analysis, including but not limited to an independent preliminary competition analysis of the proposed transaction based on publicly available information and information in the Commission’s records.²⁶

13. Under the interim policy, to decide whether a proposed assignment serves the public interest, we first determine whether it complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission’s rules, including our local radio ownership rules. If it does, we then consider any potential public interest harms of the proposed transaction as well as any potential public interest benefits to determine whether, on balance, the assignment serves the public interest.²⁷

14. The Commission’s analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the Department of Justice or the Federal Trade Commission, focuses solely on whether the effect of a proposed merger “may be substantially to lessen competition”²⁸ in the advertising market, our focus is different.²⁹ Our analysis of radio license

²⁴ 47 U.S.C. § 310(d).

²⁵ See *Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

²⁶ *Id.* at 19895-96 ¶ 86.

²⁷ *Id.* at 19895 ¶ 85; see *VoiceStream Wireless Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789 ¶ 17 (2001); see also *Chet-5 Broadcasting, L.P.*, 14 FCC Rcd at 13043 ¶ 8 (holding that the Commission has “an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest”).

²⁸ 15 U.S.C. § 18.

²⁹ Although the Commission’s analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. See *FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) (“To restrict the Commission’s action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure.”). See also *RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission’s “determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the ‘special considerations’ of the particular industry.”); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff’d on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors’ Coalition, Inc. v. FCC*, 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to “analyze proposed mergers under the same standards that the Department of Justice . . . must apply.”).

assignments is informed by how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public airwaves. The Commission's public interest evaluation is therefore not limited to competition concerns but necessarily encompasses the "broad aims of the Communications Act."³⁰ These broad aims include, among other things, ensuring the existence of an efficient, nationwide radio communications service available to everyone and promoting locally oriented service and diversity in media voices.³¹ Our public interest analysis therefore includes assessing whether the transfer will affect the quality of radio services or responsiveness to the local needs of the community,³² and whether it will result in the provision of new or additional services to listeners.³³

15. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

B. Local Radio Ownership Rules

16. The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned in any given local radio market.³⁴ A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.³⁵ Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations, a single entity may own up to eight commercial radio stations, no more than five of which are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are

³⁰ See *AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*Worldcom-MCI Order*").

³¹ For example, the Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

³² See *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 994-97 (1981); *Sixth Report and Order*, Docket No. 8736, 1 RR 91:559, :624 (1952).

³³ See, e.g., *Worldcom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

³⁴ 47 C.F.R. § 73.3555(a).

³⁵ *Id.*; see *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

in the same service, except that no single entity may control more than 50 percent of the stations in such a market.³⁶

17. Clear Channel's proposed acquisition of the Daugherty station is consistent with the numerical limits in our local radio ownership rules. Clear Channel's multiple ownership showing indicates that, using the Commission's current definition of "radio market,"³⁷ the transaction creates one radio market, composed of 16 radio stations.³⁸ In this market, a single licensee may, therefore, own up to 6 radio stations, not more than 4 of which are in the same service (AM or FM). Post-acquisition, Clear Channel will own 6 stations (2 AM/4 FM) in the market. The transaction therefore complies with the local radio ownership rules.

C. Public Interest Analysis Under Interim Policy

18. In the interim policy we stated that, consistent with precedent, we will continue to examine the potential competitive effects of proposed radio station combinations. Competition analysis requires us to define at the outset the relevant product and geographic markets in which the radio stations compete. We must also determine the market shares and concentration levels that the proposed transaction would produce. Ultimately, we must weigh the potential competitive benefits and harms, as well as other public interest benefits and harms, that the proposed transaction is likely to produce to determine if, overall, grant of the underlying application would be consistent with the public interest.

19. *Relevant Product Market.* For the purposes of this competition analysis, we must first define the relevant product and geographic markets. Under our interim policy, we presume that the relevant product market is radio advertising.³⁹ Both Clear Channel and Daugherty seek to rebut this presumption. According to Clear Channel and Daugherty, the relevant product market includes advertising by other media.⁴⁰ Specifically, Clear Channel and Daugherty assert that the advertising revenues of the four different daily newspapers in Parkersburg and Marietta, the two weekly newspapers in Marietta, the local broadcast television station in Parkersburg, and the cable operators in Parkersburg and Marietta, should be considered in the market analysis.⁴¹ In support, Clear Channel also submitted two studies by Professor Jerry A. Hausman, Professor of Economics at the Massachusetts Institute of Technology ("Hausman Statements"), which purportedly demonstrate that the relevant product market includes radio, television and newspapers.⁴² The Hausman Statements are not sufficient to rebut our presumption concerning product market definition for purposes of this Order, however, because they do not discuss the particular situation in the Parkersburg metro, but rather the radio industry as a whole. We

³⁶ See *supra* note 3.

³⁷ See *Definition of Radio Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 25077, 25077-78 ¶¶ 2-3 (2000).

³⁸ See Application to Assign License for station WBRJ(AM) from Daugherty to Clear Channel (FCC Form 314) (File No. BAL-20010816AAG), dated Aug. 16, 2001, Exh. 15.

³⁹ *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895 ¶ 86.

⁴⁰ Clear Channel Response at 2; Daugherty Response at 3-4.

⁴¹ *Id.*

⁴² See Clear Channel Response, Exh. 2. Clear Channel states that these same statements were also filed in connection with Clear Channel's comments in the pending radio ownership rulemaking proceeding. See Clear Channel Response at 2.

will address such generalized arguments in the pending local radio ownership rulemaking proceeding, not in individual cases decided under our interim standards.

20. Under standard competition analysis, alternative media would be included in the relevant product market only if their presence would preclude a hypothetical monopolist of radio advertising from profitably raising prices by a “small but significant and nontransitory” amount.⁴³ In markets such as radio advertising, where individually negotiated contracts and repeated interaction between buyers and sellers facilitate price discrimination, determining the relevant product market can be more complicated. Standard competition analysis provides that where there is price discrimination, we look at those buyers that do not consider other media to be good substitutes for radio advertising.⁴⁴ We consider evidence, however, from the parties that the relevant product market in a specific case includes other forms of media advertising or should be based on listenership rather than advertising. While some advertisers may find other media to be good substitutes for radio, Clear Channel and Daugherty do not address our concern that there may be a significant number of advertisers that do not consider other media to be good substitutes for radio. Radio station groups that are able to exercise market power may be able to profitably impose a discriminatory price increase to these targeted advertisers, even if they are unable to impose a general increase in price on all radio advertisers because that general price increase would not be profitable.⁴⁵ Clear Channel and Daugherty’s arguments consist merely of assertions that other forms of media advertising are available to Parkersburg metro advertisers. As such, Clear Channel and Daugherty have not rebutted the presumption that radio advertising is the relevant product market.

21. *Relevant Geographic Market.* Pursuant to our interim policy, we presume that the relevant geographic market is the Arbitron metro. Arbitron identifies Wood County in West Virginia and Washington County in Ohio as comprising the Parkersburg metro. Determining the relevant geographic market may be complicated in a product market such as radio advertising, where individually negotiated contracts facilitate price discrimination.⁴⁶ Therefore, we consider evidence from the parties that the relevant geographic market in a specific case may be larger, smaller, or otherwise different from the Arbitron metro. While Clear Channel has, in other transactions, challenged the Commission’s presumption that the Arbitron metro is the relevant geographic market, Clear Channel states “[i]n this instance the Arbitron market appears to be fairly accurate.”⁴⁷ We find, in any event, no reason to vary from the presumption in our interim policy that the Parkersburg metro represents the appropriate geographic market.

⁴³ See, e.g., *Horizontal Merger Guidelines*, issued by U.S. Department of Justice & Federal Trade Commission, April 2, 1992, revised April 8, 1997 (“*Horizontal Merger Guidelines*”), §§ 1.1, 1.12.

⁴⁴ See *id.* § 1.12. Staff and DOJ analysis of radio transactions suggests that existing buyers of radio advertising differ significantly in their likelihood of switching to other media in response to a “small but significant and non-transitory” price increase for radio advertising.

⁴⁵ The *Horizontal Merger Guidelines* at §1.12 state: “If a hypothetical monopolist can identify and price differently to those buyers (“targeted buyers”) who would not defeat the targeted price increase by substituting to other products in response to a ‘small but significant and nontransitory’ price increase for the relevant product, then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers. This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable.”

⁴⁶ See *Horizontal Merger Guidelines* at §1.22.

⁴⁷ Clear Channel Response at 3.

22. *Market Participants.* In the Parkersburg metro, Clear Channel currently owns five stations and, pursuant to a local marketing agreement (“LMA”), operates the Daugherty station it seeks to acquire in this transaction.⁴⁸ BIA identifies 11 other commercial stations and four non-commercial stations in the Parkersburg metro.⁴⁹ Clear Channel sells the commercial advertising on one of these stations – WVVV(FM), Williamstown, WV – licensed to Bennco, Inc. (“Bennco”), pursuant to a joint sales agreement (“JSA”). One of the stations, WCMO(FM), Marietta, OH, although listed by BIA as a commercial radio station, is licensed to Marietta College, an educational institution. BIA also identifies three out-of-market commercial stations that historically have had listeners in the Parkersburg metro.⁵⁰

23. Clear Channel argues that the relevant market participants should not be limited to radio stations and should include, “at a minimum, the newspapers serving Parkersburg and Marietta and television station WTAP-TV, Parkersburg.”⁵¹ As noted above, however, we find no reason in this case to vary from the presumption in our interim policy that radio advertising is the relevant product market.⁵² Therefore, we do not include the newspapers and television station serving Parkersburg and Marietta in the list of market participants.

24. Clear Channel also states that it does not own any of the out-of-market radio stations and that they “appear to receive 15.4 percent of the listening” in the Parkersburg metro.⁵³ Staff analysis suggests that businesses seeking to use radio to reach potential customers in the Parkersburg metro would consider out-of-market stations to be poor substitutes for in-market stations. BIA data show that all three of the listed out-of-market stations received zero percent listening share in the most recent ratings period for which data are available. Consequently, out-of-market radio stations would not likely be used to reach large audiences in the Parkersburg metro. It is much more likely that the four in-market non-commercial stations in the Parkersburg metro account for the majority of the 15.4 percent listening share not accounted for by in-market commercial stations. We are not convinced that non-commercial stations offer appreciable competition to commercial stations for advertising revenue, even though they compete for audience and may garner “sponsorships” of their programming. In sum, Clear Channel has not provided sufficient evidence to rebut our presumption that the market participants are limited to the in-market commercial radio stations for purposes of our analysis of this transaction.

⁴⁸ BIA incorrectly shows Clear Channel as the owner of WBRJ(AM).

⁴⁹ Of these 11 in-market commercial radio stations, Burbach owns the following five stations, all licensed to serve the community of Parkersburg, WV: (1) WADC(AM); (2) WGGE(FM); (3) WHBR-FM; (4) WKYG(AM); and (5) WXIL(FM); JAWCO, Inc. owns the following three stations: (1) WJAW-FM, McConnellsville, OH; (2) WJAW(AM), St. Marys, WV; and (3) WMOA(AM), Marietta, OH; and Bennco, Inc., Marietta College, and Seven Ranges Radio Company, Inc., own the remaining three stations, respectively: (1) WVVV(FM), Williamstown, WV; (2) WCMO(FM), Marietta, OH; and (3) WRRR-FM, St. Marys, WV. The four non-commercial stations are: (1) WCVV(FM), Belpre, OH, licensed to Belpre Educational Broadcasting Foundation; (2) WMBP(FM), Belpre, OH, licensed to Lower Ohio Valley Education Corp.; (3) WMRT(FM), Marietta, OH, licensed to Marietta College; and (4) WVPF(FM), Parkersburg, WV, licensed to W.V. Educational Broadcasting Authority.

⁵⁰ The three out-of-market stations are: (1) WRYV(FM), Gallipolis, OH, owned by Legend Communications, L.L.C.; (2) WFBY(FM), Clarksburg, WV, owned by West Virginia Radio; and (3) WVAQ(FM), Morgantown, WV, also owned by West Virginia Radio.

⁵¹ Clear Channel Response at 3.

⁵² See *supra* ¶¶ 19-20.

⁵³ *Id.*

25. *Market Share and Market Concentration.* Under the interim policy, we presume that BIA revenue share estimates accurately reflect actual market shares. According to the BIA database, radio stations that are home to the Parkersburg metro market generate \$5,925,000 in radio advertising revenues. Using BIA data, the post-transaction market structure in the Parkersburg metro is as follows:⁵⁴

Owner	2001 Market Revenue	2001 Market Share	2001 Audience Share
Clear Channel	\$3,300,000	55.7%	44.2% (52.2% of in-market)
Bennco	\$ 200,000	3.4%	6.2% (7.3% of in-market)
Burbach	\$1,600,000	27.0%	30.5% (36.1% of in-market)
JAWCO Inc.	\$ 525,000	8.9%	3.1% (3.7% of in-market)
Seven Ranges Radio	\$ 300,000	5.1%	0.6% (0.7% of in-market)
Total	\$5,925,000	100%	84.6% ⁵⁵ (100% of in-market)

The five stations that Clear Channel currently owns account for a 55.7 percent share of advertising revenues and 52.2 percent of in-market listening. The stations owned by Clear Channel and Burbach, the second largest owner, together account for 82.7 percent of advertising revenues and 88.3 percent of in-market listening. Also, as noted in the “Market Participants” discussion above, Clear Channel sells, pursuant to a JSA, the commercial advertising on Bennco’s station WVVV(FM) which accounts for a 3.4 percent share of advertising revenues in the Parkersburg metro. The station Clear Channel seeks to acquire, WBRJ(AM), currently shows a zero percent revenue share, presumably reflecting the station’s operation with temporary facilities at reduced power. Based on the BIA data, therefore, the proposed transaction would not change Clear Channel’s market share in the Parkersburg metro.⁵⁶ Without any share contribution from WBRJ(AM), however, Clear Channel controls twice the revenue share of its nearest rival.

26. Clear Channel maintains that the market share percentages “deserve little weight” because BIA revenue data are based on “sometimes rather rough estimates” generated through the use of direct mail surveys, telemarketing, market contacts and computer modeling, and because BIA incorrectly estimates the revenue earned by a particular station by not differentiating between revenue earned from in-market and out-of-market sources.⁵⁷ Clear Channel does not provide, however, alternative revenue figures for any stations, including its own. While BIA only provides revenue estimates for stations in Arbitron metro areas, we find no reason to question the accuracy of the presumed market share information available for Clear Channel’s stations.

27. Our interim policy recognizes the Herfindahl-Hirschman Index (“HHI”) as a measure of market concentration but finds that the general standards regarding the post-merger HHI found in the *Horizontal Merger Guidelines* may not be entirely appropriate when applied to the commercial radio industry.⁵⁸ While the HHI may provide useful information regarding the potential unilateral and

⁵⁴ Radio stations with no reported revenue are not included in the chart.

⁵⁵ See *supra* ¶ 24 regarding the remaining 15.4% of the total listening share.

⁵⁶ The transaction would, however, permit the dominant firm to acquire additional capacity in the market.

⁵⁷ Clear Channel Response at 4.

⁵⁸ *Horizontal Merger Guidelines*, § 1.51. See *Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145, 11150 (1999). The following radio mergers that included settlements with DOJ attest to DOJ’s recognition that an HHI over 1800 may not necessarily imply adverse competitive consequences in a local radio market. See, e.g., Final Judgment in (continued....)

coordinated effects of a proposed merger, any measured HHI must be carefully interpreted within the full context of the factual circumstances of the proposed merger. Factors considered in interpreting the significance of any measured HHI include, but are not necessarily limited to: the existence of other viable competitors post-merger; the dominance of strong signals; the possibility of additional entry into the metro; efficiencies created by the merger; and possible adverse effects on listeners in the local radio market.⁵⁹ Our preliminary competition analysis using the BIA database shows that the proposed combination of stations in the relevant geographic market results in an HHI equal to 3947 with no change in the HHI based on WBJR(AM)'s temporary, reduced-power operations.

28. Clear Channel asserts that the Commission's HHI calculation does not accurately indicate market concentration,⁶⁰ based in part on its contention that radio advertising alone does not constitute the relevant product market. Clear Channel also contends that the Commission bases its HHI calculation on BIA revenue data, which artificially constricts the presumed market participants and is often inaccurate.⁶¹ As noted above, we are not persuaded that the presumptive product market and BIA revenue estimates for Clear Channel are inappropriate in this case. Moreover, Clear Channel does not proffer its own HHI calculation and does not present sufficient evidence to overcome our concern about the highly concentrated nature of the Parkersburg radio market that the calculated HHI would suggest.

29. *Conditions of Entry.* We consider evidence regarding the possibility of entry by new stations, as well as any barriers to entry, and the timeliness, likelihood, and sufficiency of entry to counter any potential market power. Clear Channel asserts that, because radio stations are subject to change via minor technical amendments to upgrade, downgrade, or relocate stations, or through petitions to change a station's community of license, it is impossible to predict what further modifications may be possible as a result of such changes or what opportunities for a station to enter the Parkersburg market may arise in the future.⁶² While new entry and station relocation is possible in some radio markets, the record in this case does not support a conclusion that there is sufficient new capacity available in the form of potential entry and/or station relocation that could come forward to offset potential adverse competitive effects should Clear Channel attempt to exercise market power following the proposed transaction.

30. *Potential Adverse Competitive Effects: Unilateral and Coordinated Effects.* Under the interim policy, relevant evidence concerning the potential adverse competitive effects of a proposed transaction may include direct proof of adverse competitive effects or facts that demonstrate that

(...continued from previous page)

United States v. CBS Corporation and American Radio Systems Corporation, Case No. 98CV00819 (D.D.C. June 30, 1998); Final Judgment in *United States v. Hicks, Muse, Tate & Furst, Inc.*, Case No. CV 98-2422, (E.D.N.Y. Aug. 17, 1998); Final Judgment in *United States v. EZ Communications, Inc. and Evergreen Media Corp.*, Case No. 97CV00406 (D.D.C. Jun. 17, 1997); Final Judgment in *United States v. Westinghouse Electric Corporation*, Case No. 96 CV02563 (D.D.C. Mar. 10, 1997); Final Judgment in *United States v. Jacor Communications, Inc.*, Case No. C-1-96-757 (S.D. Ohio, Dec. 31, 1996).

⁵⁹ *Great Empire Broadcasting, Inc.*, 14 FCC Rcd at 11148 ¶ 16.

⁶⁰ Clear Channel Response at 4. *See also* Daugherty Response at 4.

⁶¹ Clear Channel Response at 4.

⁶² *Id.* at 5-6. Daugherty suggests that the acquisition of WBRJ(AM) by another broadcaster in the market would not enable that incumbent to compete more effectively against Clear Channel because it would not have the same level of skilled sales people or advertising accounts and therefore would not increase the incumbent's share of advertising revenues. *See* Daugherty Response at 3. There is no basis in the record to substantiate this speculation.

structural conditions (*e.g.*, a higher market share and significant barriers to entry) will facilitate the exercise of market power. We also consider the effect on competition, if any, that may have resulted from pre-existing LMAs or JSAs.

31. Clear Channel notes that it currently provides programming for and sells the commercial advertising on WBRJ(AM) pursuant to an LMA.⁶³ Therefore, according to Clear Channel, its acquisition of the station will not alter the existing competition landscape in the Parkersburg market.⁶⁴ Clear Channel states, “whether Clear Channel sells time on WBRJ as the station’s owner or pursuant to the LMA, its sales decisions and pricing power remain the same.”⁶⁵ We are not persuaded by Clear Channel’s argument that, because it has operated the station it seeks to acquire pursuant to an LMA, the present transaction is negligible in terms of its impact on competition. This is the first opportunity the Commission will have had to consider any anticompetitive effects because we do not currently review LMAs when they are executed. In any event, there is no substantial evidence on the record in this case from which we might conclude that no adverse effects have resulted from the aggregation of economic power attributable to Clear Channel’s LMA relationship.

32. Clear Channel also argues that “concerns about coordinated behavior between radio owners in a local market are misplaced. Radio is a differentiated product, with different stations broadcasting different formats that are targeted to and appeal to different audiences. Accordingly, anticompetitive outcomes in differentiated product markets typically do not result from coordinated behavior, but from ‘unilateral effects.’”⁶⁶ Clear Channel contends that this argument is supported by the Hausman Statements, which consider the effect of radio industry consolidation on advertising prices and format variety. As noted above, the Hausman Statements do not discuss the particular situation in the Parkersburg metro, but rather address the radio industry as a whole.⁶⁷ We will address Clear Channel’s generalized arguments in the pending local radio ownership rulemaking proceeding. Moreover, we need not decide this issue here because we find that public interest benefits outweigh our competition concerns regarding the subject transaction (*see infra*).

33. The current market structure raises competition concerns. Clear Channel is currently the dominant radio group in the Parkersburg metro, owning five stations with an aggregate 55.7 percent revenue share and 52.2 percent in-market audience share. It also sells, pursuant to a JSA, the commercial advertising on station WVVV(FM) which accounts for 3.4 percent of the advertising revenues in the Parkersburg metro. Post-transaction, these numbers will be unchanged because of WBRJ(AM)’s zero reportable revenues and audience share in 2001. Together, the two largest radio groups – Clear Channel and Burbach – post-transaction will own 11 of the 17 in-market stations, which currently account for 82.7 percent of the advertising revenues and 88.3 percent of the in-market listeners, and have a JSA for an additional in-market station. Moreover, Marietta College’s WCMO(FM) is a non-commercial station operating in the commercial band. Thus, the emergence of a potential third competitor must rely on the facilities owned by JAWCO, Inc. (“JAWCO”), which owns three stations (2 AM and 1 FM) and Seven Ranges Radio Company, Inc., which owns one (FM) station. The three out-of-market stations listed by BIA have zero listening share and do not provide a competitive alternative to the in-market stations.

⁶³ Clear Channel Response at 4.

⁶⁴ *Id.*

⁶⁵ *Id.* at 5.

⁶⁶ *Id.*

⁶⁷ *See supra* ¶ 19.

34. Clear Channel argues that JAWCO, the licensee of three radio stations in the Parkersburg metro, serves as a viable third competitor.⁶⁸ Given Clear Channel's dominant share in the Parkersburg market and the low audience share (3.7 percent) held by JAWCO, which owns only one FM station (Class A) in the metro, we are not persuaded that JAWCO is likely to constrain or otherwise offset the potential exercise of market power by Clear Channel.

35. Clear Channel's proposed acquisition of WBRJ(AM) makes the emergence of a third viable competitor more difficult. The Parkersburg metro market is highly concentrated and there are significant barriers to entry. This market structure increases the risk of coordinated behavior leading to price discrimination, division of advertising accounts, and lower quality programming. As the D.C. Circuit has stated, "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination. Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to . . . achieve profits above competitive levels. The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices. . . . Tacit coordination 'is feared by antitrust policy even more than explicit collusion, for tacit coordination, even when observed, cannot be easily controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.'"⁶⁹ Based on the record before us, we are concerned about the potential for adverse competitive effects from coordinated or unilateral behavior as a result of this transaction.

36. *Efficiencies and other public interest benefits.* Under the interim policy, we consider evidence of economic efficiencies that the proposed transaction would produce and public interest benefits the proposed transaction would provide to listeners or advertisers, such as improvements in the quality, scope and quantity of community responsive programming, improved community service, and the furtherance of localism. Parties asserting that a proposed transaction will produce efficiencies and other public interest benefits are required to show both how the transaction will produce those benefits and how those benefits will flow through to listeners or advertisers.

37. Both Clear Channel and Daugherty argue that the proposed transaction will not harm advertisers or listeners in the Parkersburg market because the Daugherty station is currently in financial distress and, absent approval of this transaction, is likely to go off the air.⁷⁰ In support of this argument, Daugherty submitted an informal "failing station" showing, using the failing station guidelines we proposed in our *Local Radio Ownership NPRM*.⁷¹ According to Daugherty, both of the immediate prior owners "suffered enormous financial losses."⁷² In addition, Daugherty submitted excerpts from

⁶⁸ *Id.* at 5.

⁶⁹ *FTC v. Heinz*, 246 F.3d at 724-25 (quoting 4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law*, ¶ 901b2 at 9 (rev. ed. 1998)) (other quotations and citations omitted).

⁷⁰ Clear Channel states that without the revenues generated from its LMA with Daugherty, the station "would not be able to survive and go dark...depriving the public of service." See Clear Channel Response at 1. Daugherty also asserts that "[w]ithout this arrangement, WBRJ could not possibly survive." See Daugherty Response at 3; Daugherty Supp. Response at 3.

⁷¹ In our *Local Radio Ownership NPRM*, we sought comment on our proposal to use the failing station criteria we adopted in our television local ownership rules as a model to evaluate failing station showings in our competition analysis of radio mergers. See *Local Radio Ownership NPRM*, 16 FCC Rcd at 19891-92 ¶¶ 74-76.

⁷² See Declaration of Steven A. Daugherty ("Daugherty Decl.") ¶¶ 45, attached to Daugherty Response and Daugherty Supp. Response.

Arbitron's "Target Listener Trends" for the Fall of 1997 to the Fall of 1999, indicating that the station had a low all-day audience share.⁷³ Daugherty also asserts that its immediate predecessor had to take the station off the air in December 1999 and the station remained silent until June 2001, except for 18 days during which it was operated on a non-commercial basis.⁷⁴ Apparently, the station was taken silent because of a dispute over the use of the transmitter site, which is owned by the City of Marietta.⁷⁵ Daugherty acquired the station in March 2001 and put the station back on the air on June 20, 2001 at a temporary site, under Special Temporary Authorization issued by the Commission, operating with a long wire antenna at reduced power.⁷⁶ The Commission subsequently issued Daugherty a construction permit to restore the station to its licensed 5 kW directional facilities,⁷⁷ and Clear Channel has advised Daugherty that, if it acquires the station, it plans to complete that work.⁷⁸ In its Supplemental Response, Daugherty indicated that "the assistance provided by Clear Channel" allowed Daugherty to "complete the physical construction of the towers provided for in the construction permit and [Daugherty] expects that the 5 kW directional facilities will be fully operational within the next 120 days."⁷⁹ We expect that audience ratings and revenue will remain negligible until the station returns to its licensed 5 kW directional facilities.

38. Daugherty asserts that upon a revenue analysis following its acquisition of the station, "[i]t soon became apparent to me that trying to run the stations [sic] as an independent, stand alone facility, was going to be suicidal."⁸⁰ In support, Daugherty submitted financial data indicating that the monthly payments it receives from Clear Channel pursuant to the LMA it had entered into in August 2001 "just covers the servicing of the Daugherty debt and the operating expenses of the station."⁸¹ Under the LMA, Clear Channel also provides the programming on WBRJ(AM), which Daugherty states it could not afford on its own.⁸²

39. Daugherty submitted a copy of a letter from Robert J. Connelly, a radio broker, asserting that it would be "extremely unlikely" that WBRJ(AM) could be sold to an entity outside of the Parkersburg metro market.⁸³ Daugherty argues that WBRJ(AM) would not be viable as a stand-alone facility because "the problems faced by WBRJ are a direct result of the extreme dominance of FM in the Parkersburg-Marietta market" and "the only way for the station to be viable is to partner with, or [be]

⁷³ Daugherty Supp. Response, Exh. A.

⁷⁴ *Id.*; see also Daugherty Response at 2.

⁷⁵ See Letter from Lisa Scanlan, Supervisory Attorney, Audio Services Division, Mass Media Bureau, to John C. Trent, Esq. (dated Jul. 17, 2000) and Letter from H. Taft Snowden, Supervisory Attorney, Audio Services Division, Mass Media Bureau, to John C. Trent, Esq. (dated Oct. 17, 2000), both attached to the Daugherty Response.

⁷⁶ Daugherty Response at 2; Daugherty Decl. ¶¶ 6 & 10.

⁷⁷ FCC File No. BMP-20011114AAQ.

⁷⁸ Daugherty Decl. ¶ 10.; see also Clear Channel Response at 1.

⁷⁹ Daugherty Supp. Response at 3.

⁸⁰ Daugherty Decl. ¶ 6; Daugherty Supp. Response at 3.

⁸¹ Daugherty Supp. Response at 2 (referencing attached Exh. D).

⁸² Daugherty Supp. Response at 2.

⁸³ Letter from Robert J. Connelly, The Connelly Co. Broadcast Brokers & Consultants, to Lauren A. Colby, Esq., Counsel for Daugherty Broadcasting Company, L.L.C. (dated Jul. 17, 2002) ("Connelly Decl."), attached as Exh. E to Daugherty Supp. Response.

acquired by, an established group....”⁸⁴ This argument is also raised by Mr. Connelly.⁸⁵ The record further indicates that before Daugherty purchased WBRJ(AM) in 2001, the prior owners had difficulty in finding an in-market or out-of-market buyer for the station. Daugherty submitted a declaration from a broker, who had been hired in 1999 by the then-owners of the station, explaining his difficulty finding an interested purchaser.⁸⁶ The eventual purchaser – Daugherty – acquired the station apparently for a distress-sale price.⁸⁷

40. In addition, Clear Channel argues that its acquisition of WBRJ(AM) will result in operating efficiencies “realized through sharing facilities, engineering, and office administrative personnel, as well as the consolidation of certain backroom functions such as accounting, traffic and receptionist duties.”⁸⁸ Clear Channel also claims that local advertisers “benefit from the option of having big-market talent produce their spots on the station,” resulting in the delivery of a high quality product in a small market.⁸⁹ Clear Channel further contends that the proposed transaction will produce public interest benefits for listeners in the Parkersburg metro, as demonstrated by its operation of the Daugherty station pursuant to an LMA.⁹⁰ The record indicates that the combined operation of the Clear Channel and Daugherty stations has improved local access to news and local information.⁹¹ Clear Channel also asserts that it plans to use WBRJ(AM)’s sports format to devote additional time to localized sports programming, such as the broadcasting of high school sports.⁹² Finally, Clear Channel claims that, post-acquisition, it will continue to use WBRJ(AM) to serve Parkersburg listeners through the sponsorship and promotion of local activities, organizations, and charities.⁹³

41. On reviewing the record for this transaction, we conclude that the acquisition of WBRJ(AM) by Clear Channel has the potential to affect adversely competition for radio listeners and advertisers in the Parkersburg metro. We are persuaded by the evidence provided in the parties’ submissions, however, that WBRJ(AM) is not currently, and likely has not been for many years, economically viable as a stand-alone AM station in the Parkersburg metro market. Because the probable alternative to the proposed transaction is that WBRJ(AM) will become silent, we conclude that the significant public interest benefits resulting from the continued operation of WBRJ(AM), together with the program improvements Clear Channel plans as owner of the station, outweigh the harm to competition in the local Parkersburg metro market.

⁸⁴ Daugherty Decl. ¶¶ 7-8.

⁸⁵ Connelly Decl. at 1.

⁸⁶ Declaration of John Willis (dated Jul. 17, 2002) ¶¶ 1-4, attached as Exh. C to Daugherty Supp. Response.

⁸⁷ *Id.*

⁸⁸ Clear Channel Response at 6.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1.

⁹¹ WBRJ(AM) airs a program called “Insight,” produced by Clear Channel’s news/talk station, WLTP(AM), Parkersburg, WV, which focuses on issues concerning the residents in the Parkersburg – Marietta area. *Id.*

⁹² Clear Channel Response at 1-2.

⁹³ *Id.* at 2.

IV. CONCLUSION

42. Based on the foregoing analysis and our review of the assignment application, we find no substantial and material questions of fact as to the effect of the proposed transaction on competition that warrants further inquiry. Clear Channel is qualified to be the licensee of WBRJ(AM) and grant of this transaction is consistent with the public interest, convenience and necessity.

V. ORDERING CLAUSES

43. ACCORDINGLY, IT IS ORDERED, That the application to assign station WBRJ(AM), Marietta, Ohio, from Daugherty Broadcasting Company, L.L.C. to Clear Channel Broadcasting Licenses, Inc. (File No. BAL-20010816AAG) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**DISSENTING STATEMENT
OF
COMMISSIONER MICHAEL J. COPPS**

Re: Application of Daugherty Broadcasting Company, LLC, Assignor, and Clear Channel Broadcasting Licenses, Inc., Assignee for Consent to Assignment of License of WBRJ(AM), Marietta, Ohio

I cannot support the transfer of WBRJ to Clear Channel. In the past I have approved license transfers that result in significant levels of market concentration when the station at issue is a “failing station.” In this case, the parties have not made an adequate showing to demonstrate that WBRJ is a failing station. Daugherty has not shown that it has attempted to sell the station to another buyer, whether to a new entrant or an existing licensee in the market with a smaller market share than Clear Channel.

I am further troubled by the majority’s finding that the acquisition of a station with no current reportable advertising and audience share does not increase Clear Channel’s market share. The acquisition of an existing radio station by a radio group with a large share of that market adversely affects competition over the long term, taking capacity out of the market and preempting the ability of other potential owners to acquire that station.

When harm to competition is likely to result from any transaction, the Commission must assure itself with as much certainty as is possible that, despite the harm to competition, the transaction will nonetheless serve the public interest, convenience and necessity. I do not find that to be the case here.